UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Kevin Hokenstrom

v. Case No. 14-cv-557-SM

N.H. Department of Corrections, William Wrenn, Robert MacLeod, Helen Hanks, Denise Rancourt, Ryan Landry, Bernadette Campbell, Christopher Kench, and Jeffrey Fetter

REPORT AND RECOMMENDATION

Under the aegis of 42 U.S.C. § 1983, pro se plaintiff Kevin Hokenstrom has sued the New Hampshire Department of Corrections ("DOC") and several current and former DOC employees. He claims that while he was incarcerated by the DOC in the Northern New Hampshire Correctional Facility ("NCF"), defendants violated his rights under the Eighth and Fourteenth Amendments to the United States Constitution, and under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-34. He also asserts a state-law claim for negligence. Before me for a report and recommendation is a motion for summary judgment filed by all of the named defendants other than William Wrenn. Hokenstrom objects. For the reasons that follow, defendants' motion for summary judgment should be granted.

Summary Judgment Standard

"Summary judgment is appropriate as long as the record reflects no genuine issue of material fact and demonstrates that the moving party is entitled to judgment as a matter of law." United States v. McNicol, 829 F.3d 77, 80 (1st Cir. 2016) (citing Fed. R. Civ. P. 56(a); Schiffmann v. United States, 811 F.3d 519, 524 (1st Cir. 2016)). When ruling on a motion for summary judgment, the court must "take the facts and all reasonable inferences therefrom in the light most hospitable to the nonmoving party." McNicol, 829 F.3d at 80. To defeat a summary-judgment motion, "[t]he non-moving party . . . must 'produc[e] specific facts sufficient to deflect the swing of the summary judgment scythe.'" Xiaoyan Tang v. Citizens Bank, N.A., 821 F.3d 206, 215 (1st Cir. 2016) (quoting Mulvihill v. Top-Flite Golf Co., 335 F.3d 15, 19 (1st Cir. 2003)).

Background

The facts recited in this section are either undisputed or are drawn from Hokenstrom's pleadings.

Hokenstrom has been in the custody of the DOC since February of 2001. He has several physical impairments including an unusually short right leg, an unusually wide left foot, and a

neuroma in his left foot.[1]

At all times relevant to plaintiff's claims, i.e., since December 12, 2011, see doc. nos. 44 and 47, the DOC has provided Hokenstrom with an above-the-knee prosthesis for his right leg. His prosthesis requires periodic maintenance and repair, which often must be performed off site. From February 29, 2012, through March 27, 2012, Hokenstrom was without a prosthesis because his was off site for service, and the servicer took about a month to send a loaner leg. Similarly, from April 16, 2014, through September 18, 2014, Hokenstrom was without his prosthesis because it was off site for service.

From 2004 through 2013, the DOC provided Hokenstrom with sneakers, rather than the heeled boots it issued to other inmates. Hokenstrom says that the sneakers were necessary, because he requires a flat-soled shoe for his prosthetic leg and because he needs wider shoes than the standard-issue DOC footwear, due to his wide foot and his neuroma. In 2013, Ryan Landry, a nursing coordinator with the DOC's Department of

[1] "Neuroma" is a "[g]eneral term for any neoplasm derived from cells of the nervous system." Stedman's Medical Dictionary 1311 (28th ed. 2006). A "neoplasm" is "[a]n abnormal tissue that grows by cellular proliferation more rapidly than normal and continues to grow after the stimuli that initiated the new growth cease." Id. at 1288.

Medical and Forensic Services, attempted to place an order for new sneakers for Hokenstrom. However, Dr. Jeffrey Fetter, the Chief Medical Officer for the New Hampshire State Prison, reviewed Hokenstrom's medical records and determined that the sneakers which the DOC had been providing him were not a medical necessity. Thereafter, Hokenstrom was not provided sneakers by the DOC, but was told that he could purchase sneakers from the prison canteen.

During the course of Hokenstrom's incarceration, "the DOC employed a three-level procedure for handling inmate grievances 'concerning any condition of confinement.'" Gray v. Perkins, No. 14-cv-386-PB, 2016 WL 5108030, at *3 (D.N.H. Sept. 20, 2016) (quoting DOC Policy and Procedure Directive ("PPD") 1.16(III)(E)). Judge Barbadoro described the grievance procedure this way:

> To complete the first level of the DOC's grievance process, an inmate utilizes an Inmate Request Slip ("IRS") "addressed to the lowest level staff person with the authority to address the issue raised." PPD 1.16(IV)(A)(1). "A request slip regarding any issue must be received within 30 calendar days of the date on which the event complained of occurs." Id. An inmate dissatisfied with the response to an IRS may, within thirty days of the date of that response, direct a Grievance Form to the Warden or Director of the DOC facility in which the inmate is then housed. PPD 1.16(IV)(B). An inmate dissatisfied with the Warden's response to his grievance, within thirty days of the denial of his

> grievance to the Warden, may appeal that denial to the DOC Commissioner. PPD 1.16(IV)(C)(1). The timeframes set forth in PPD 1.16, and the use of appropriate forms, at each level of the DOC grievance process, are mandatory. PPD [1.16](IV)(E)&(F).

Id. at *3 (citations to the record omitted).

Discussion

On preliminary review, the court allowed Hokenstrom to serve claims for: (1) violating his Eighth Amendment right to be free from cruel and unusual punishment by depriving him of a prosthesis on two occasions; (2) violating his Fourteenth Amendment right to equal protection by making him pay for his sneakers while it provided all other inmates with properly fitting footwear for free; (3) violating the ADA by excluding him from various prison activities, facilities, and opportunities, on account of his disabilities, when he was without the use of a prosthesis; and (4) negligence, under state law. Defendants move for summary judgment under multiple theories. They are entitled to judgment as a matter of law on plaintiff's three federal claims on one of the grounds they identify: Hokenstrom's failure to exhaust the administrative remedies available to him before he filed suit. And, defendants are entitled to judgment as a matter of law on plaintiff's

state-law negligence claim because he has disavowed it.

A. Plaintiff's Federal Claims

Defendants argue that they are entitled to judgment as a matter of law on all three of plaintiff's federal claims because he has not satisfied the exhaustion requirement imposed by the Prison Litigation Reform Act of 1995 ("PLRA"). They are correct.

Under the PLRA, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). A prisoner seeking to exhaust his administrative remedies under the PLRA must complete the administrative review process that is available at his correctional facility in accordance with the procedural rules of that facility. See Ross v. Blake, 136 S. Ct. 1850, 1856 (2016); Jones v. Bock, 549 U.S. 199, 218 (2007); Woodford v. Ngo, 548 U.S. 81, 93 (2006). Moreover, a prisoner must exhaust his administrative remedies before filing suit, and if he fails to do so, his unexhausted claim(s) must be dismissed. See Medina-Claudio v. Rodríguez-Mateo, 292 F.3d 31, 36 (1st Cir. 2002).

To prevail on the affirmative defense of failure to exhaust, at summary judgment, "the defendant must show that no reasonable jury could find that [the plaintiff] exhausted the administrative remedies available to him before commencing [his] action." Polansky v. McCoole, No. 13-cv-458-JL, 2016 WL 237096, at *3 (D.N.H. Jan. 20, 2016). However, if the defendant carries

> the initial burden of showing that plaintiff failed to exhaust all of his generally available administrative remedies . . . "the burden shifts to the prisoner to come forward with evidence showing that there something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him."

Santiago v. N.H. Dep't of Corr., Comm'r, No. 14-cv-100-JL, 2015 WL 5097782, at *3 (D.N.H. Aug. 27, 2015) (quoting Albino v. Baca, 747 F.3d 1162, 1172 (9th Cir. 2014)).

It is undisputed that Hokenstrom has filed many inmate request slips pertaining to: (1) the time he has spent without a prosthesis, which is the factual predicate for his Eighth Amendment and ADA claims; and (2) the DOC's decision to stop providing him with free sneakers, which is the factual predicate for his equal protection claim. However, defendants argue, with record support, that plaintiff never completed the administrative review process outlined in PPD 1.16 by pursuing either a prosthesis complaint or a footwear complaint through

all three levels of the DOC grievance procedure. For his part, plaintiff has not produced evidence to show that he ever completed the procedure outlined in PPD 1.16. Rather, he appears to concede that he did not follow the letter of PPD 1.16, but argues that he was not obligated to do so because: (1) the administrative structure of the DOC renders PPD 1.16 inapplicable to the kind of complaints he was making, which pertained to medical matters over which the Warden has little say; (2) the inapplicability of PPD 1.16 to his complaints made that remedy unavailable to him; (3) the steps he did take to grieve his prosthesis and footwear complaints were sufficient to satisfy the intent of PPD 1.16.

For the legal theory underlying his argument, plaintiff relies upon the U.S. Supreme Court's recent decision in Ross. In Ross, the Supreme Court rejected "the Fourth Circuit's adoption of a 'special circumstances' exception to [the PLRA's exhaustion] mandate," 136 S. Ct. at 1856, but went on to explain:

> [O]ur rejection of the Fourth Circuit's "special circumstances" exception does not end this case — because the PLRA contains its own, textual exception to mandatory exhaustion. Under § 1997e(a), the exhaustion requirement hinges on the "availab[ility]" of administrative remedies: An inmate, that is, must exhaust available remedies, but need not exhaust unavailable ones.

Id. at 1858.[2] The court went on to "note . . . three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief." Id. at 1859. Plaintiff contends that two of the circumstances identified by the Ross Court apply to his case.

Under the first circumstance, "an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end – with officers unable or consistently unwilling to provide any relief to aggrieved inmates." Ross, 136 S. Ct. at 1859 (citing Booth v. Churner, 532 U.S. 731, 736 (2001)). The court elaborated:

> Suppose, for example, that a prison handbook directs inmates to submit their grievances to a particular administrative office — but in practice that office disclaims the capacity to consider those petitions. The procedure is not then "capable of use" for the pertinent purpose. In Booth's words: "[S]ome redress for a wrong is presupposed by the statute's requirement" of an "available" remedy; "where the relevant administrative procedure lacks authority to provide any relief," the inmate has "nothing to exhaust." Id., at 736, and n.4. So too if administrative officials have apparent authority, but decline ever to exercise it. Once again: "[T]he modifier 'available' requires the possibility of some relief." Id., at 738. When the facts on the ground

[2] The "special circumstances" exception that the Supreme Court struck down in Ross was drawn by the Fourth Circuit from the Second Circuit's decision in Giano v. Goord, 380 F.3d 670, 676 (2d Cir. 2004).

> demonstrate that no such potential exists, the inmate has no obligation to exhaust the remedy.

Id. (parallel citations omitted).

Here, plaintiff does not claim, and has produced no evidence to show, that any DOC official identified in PPD 1.16 ever: (1) disclaimed the capacity to consider grievances pertaining to his lack of a prosthesis or the decision to make him pay for his sneakers; or (2) declined to exercise his or her authority to consider a grievance arising from his prosthesis or footwear complaints. In other words, plaintiff has identified no "facts on the ground" that rendered the PPD 1.16 grievance procedure unavailable to him. Thus, he has failed to establish the first unavailability circumstance identified by the Ross Court.

Instead of identifying recalcitrant DOC officials, plaintiff argues that because the Warden is not a part of the "chain of command" for the DOC's Department of Medical and Forensic Services, PPD 1.16 does not apply to his grievances about prosthesis and footwear issues. But there is a big difference between the Warden or the Commissioner disclaiming the capacity to consider grievances, or declining to exercise their authority to do so, and what we have here — plaintiff's untested belief that the Warden lacked the authority to provide

relief on his prosthesis or footwear complaints. Plaintiff's belief that the conditions on which he bases his federal claims lie outside the Warden's authority, absent any action by the Warden that would justify that belief, did not relieve plaintiff of the obligation to follow the grievance procedure set out in PPD 1.16. See Santiago, 2015 WL 5097782, at *4 ("a prisoner's belief that exhaustion will be futile [is not] sufficient to excuse exhaustion of the prison's available administrative remedies, as there is no futility exception to the PLRA exhaustion requirement") (internal quotation marks and citation omitted).

Plaintiff also argues that the facts of this case fall under a second circumstance described by the Ross Court: "an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use." Ross, 136 S. Ct. at 1959. Again, the Supreme Court elaborated:

> In this situation, some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate it. As the Solicitor General put the point: When rules are "so confusing that . . . no reasonable prisoner can use them," then "they're no longer available." . . . When an administrative process is susceptible of multiple reasonable interpretations, Congress has determined that the inmate should err on the side of exhaustion. But when a remedy is, in Judge Carnes's phrasing, essentially "unknowable" — so that no ordinary prisoner can make sense of what it demands — then it is also unavailable. See Goebert v.

> Lee County, 510 F.3d 1312, 1323 (C.A. 11 2007); Turner v. Burnside, 541 F.3d 1077, 1084 (C.A. 11 2008) ("Remedies that rational inmates cannot be expected to use are not capable of accomplishing their purposes and so are not available"). Accordingly, exhaustion is not required.

Id. at 1859-60 (citation to the record omitted).

Plaintiff bases his invocation of the second Ross circumstance on responses he received to inmate request slips that he directed to Sue Young and to the Warden of the NCF, Michelle Goings. He submitted both of those slips on the same day in September of 2016, more than 20 months after he filed this action. Be that as it may, plaintiff asked both Young and Warden Goings to describe the chain command as it relates to medical services provided to inmates by the DOC. In his surreply, plaintiff reports the following response from Young:

> I am not aware of a published chain of command specifically for Medical. The Nurse Manager @ NCF is supervised by Carlene Ferrer (sp?) who reports directly to Paula Mattis.

Doc. no. 61 ¶ 6; see also doc. no. 61-3. Then he reports this response from Warden Goings:

> There are steps inbetween the Nurse Coordinator and the Director of Medical & Forensics. The Director of M&F has 2 Deputy Directors, one for medical & one for behavioral. There is also a Director of Nursing that reports to Director Mattis.

Id. ¶ 7; see also doc. no. 61-4. Based on the foregoing, plaintiff concludes:

> Apparently, the chain of command to follow for grievance purposes depends on who is asked, which is all in direct contradiction to P.P.D. 1.16. Therefore, in light of the above mentioned facts, exhaustion is not required pursuant to Ross v. Blake (supra).

Id. ¶ 8. The court does not agree.

The problem with plaintiff's argument that it based upon an unsubstantiated belief that complaints about medical issues are subject to a different grievance procedure than complaints about other conditions of confinement. They are not. PPD 1.16 expressly states that its purpose is "[t]o provide an administrative process through which inmates/residents seek formal review of . . . issue[s] related to any aspect of their confinement." Defs.' Mem. of Law, Ex. A1 (doc. no. 48-3), at 1 (emphasis added). PPD 1.16 further provides that "[i]ssues concerning any condition of confinement can be grieved by any person under departmental supervision." Id. at 2 (emphasis added). Because PPD 1.16 applies to all inmate complaints, including complaints about prison medical services, and because PPD 1.16 cannot fairly be described as opaque, confusing, or essentially unknowable, plaintiff's inability to acquire a satisfactory description of the chain of command for DOC medical

services from Young and Warden Goings – more than a year after the time had passed for him to grieve the issues underlying his federal claims – does nothing to pull this case within the ambit of the second Ross circumstance and does not give him an excuse for failing to exhaust his administrative remedies.

To summarize, before he filed this action, plaintiff had not exhausted the administrative remedies available to him for seeking a remedy for the conditions underlying his three federal claims. He had no excuse for failing to do so. Accordingly, his federal claims must be dismissed, see Medina-Claudio, 292 F.3d at 36, which entitles defendants to judgment as a matter of law on plaintiff's three federal claims.

B. Plaintiff's Negligence Claim

In its order on preliminary review, the court found "that Hokenstrom's allegations of Defendants' negligence give rise to claims under state law." Order (doc. no. 10) 4. Understanding plaintiff's claim to be one for medical negligence, defendants move for summary judgment on grounds that, pursuant to N.H. Rev. Stat. Ann. ("RSA") § 507-E:2, I, plaintiff's failure to disclose an expert witness is fatal to his claim. Plaintiff counters:

> Defendants erroneously conclude [that] Petitioner's state law claims lie in Medical Negligence/Injury pursuant to RSA 507-E. This is not the case. Petitioners state law claims apply to statutorily

> grounded property interests entitling him to footwear and lost wages.

Pl.'s Obj. (doc. no. 53) ¶ 128. The state-law claim the court recognized in its order on preliminary review was a claim for negligence. Plaintiff disavows making a claim for negligence. Accordingly, defendants are entitled to judgment as a matter of law on the state-law negligence claim the court identified in its order on preliminary review. If plaintiff wishes to pursue a claim based on a state-law cause of action other than negligence, he is free to do so in an appropriate forum.

Conclusion

For the reasons detailed above, defendants' motion for summary judgment, document no. 48, should be granted. Having reached that conclusion, the court notes that defendant William Wrenn was not listed in document no. 48 as moving for summary judgment. That omission appears to have been inadvertent but, in any event, as the court can discern no reason why the analysis in this Report and Recommendation would not apply with equal force to the claims against Wrenn, the district judge should grant summary judgment to all defendants, and direct the clerk of the court to close this case.

Any objection to this Report and Recommendation must be filed within 14 days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). Failure to file an objection within the specified time waives the right to appeal the district court's order. See United States v. De Jesús-Viera, 655 F.3d 52, 57 (1st Cir. 2011); Sch. Union No. 37 v. United Nat'l Ins. Co., 617 F.3d 554, 564 (1st Cir. 2010) (only issues fairly raised by objections to magistrate judge's report are subject to review by district court; issues not preserved by such objection are precluded on appeal).

Andrea K. Johnstone
United States Magistrate Judge

November 8, 2016

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